78-1393

In the Supreme Court of the United States

OCTOBER TERM, 1978

FRED CHERRY, APPELLANT

v.

THE SECRETARY OF THE TREASURY OF THE UNITED STATES

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF NEW YORK

MOTION TO AFFIRM

WADE H. MCCREE, JR.
Solicitor General
Department of Justice
Washington, D.C. 20530

In the Supreme Court of the United States

OCTOBER TERM, 1978

78-1393

FRED CHERRY, APPELLANT

v.

THE SECRETARY OF THE TREASURY OF THE UNITED STATES

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF NEW YORK

MOTION TO AFFIRM

OPINION BELOW

The opinion of the three-judge court (J.S. App. 1a-13a) is reported at 460 F. Supp. 606.

JURISDICTION

This action was brought to enjoin the enforcement of a federal statute on the ground that it offends the First and Fifth Amendments to the Constitution. A three-judge district court was convened under the authority of 28 U.S.C. (1970 ed.) 2282.[1] The district court judgment dismissing the complaint (J.S. App. 14a) was entered on November 20, 1978. A notice of appeal to this Court was filed on January 19, 1979,

---

[1]Section 2282 was repealed as of August 12, 1976, but the repeal was made effective only as to actions commenced after that date. Pub. L. No. 94-381, 90 Stat. 1120. This action was commenced in April 1976.

and the jurisdictional statement was filed on March 12, 1979. The jurisdiction of this Court is invoked under 28 U.S.C. 1252.

QUESTION PRESENTED

Whether the venue provision in 19 U.S.C. 1305(a), which provides that forfeiture proceedings against obscene materials imported into the United States shall be brought in the district in which they are seized, is unconstitutional.

STATEMENT

Appellant is a resident of Brooklyn who spends each winter in Puerto Rico. He orders magazines and books from time to time from Europe. He has had some addressed to his New York residence and some to his winter residence in Puerto Rico. On several occasions, materials addressed to appellant have been seized by the Customs Service upon their arrival in New York and subjected to forfeiture under 19 U.S.C. 1305(a). On at least one occasion, materials addressed to appellant's residence in Puerto Rico were seized in New York as they arrived in this country via the international mails (J.S. 7-8). Under the provision of Section 1305(a) that lays venue for forfeiture proceedings in the district in which the materials are seized, a forfeiture proceeding against the materials was brought in the Southern District of New York (J.S. App. 3a).

Appellant brought this action in the District Court for the Southern District of New York challenging the constitutionality of the forfeiture statute, 19 U.S.C. 1305(a), on the ground that the statute provides that venue shall lie in the district in which the materials are seized rather than the district in which the addressee of the materials resides. That provision, he contended, unconstitutionally burdens the right of the addressee to challenge the forfeiture.

Relying on the recent decision of the Second Circuit in *United States* v. *Various Articles of Obscene Merchandise*, 562 F. 2d 185 (2d Cir. 1977), cert. denied, 436 U.S. 931 (1978), the district court dismissed the complaint (J.S. App. 1a-13a). The court held that the venue provision in Section 1305(a) does not unconstitutionally burden the claimant's right to defend in the forfeiture proceeding, and that there is no constitutional requirement that the forfeiture proceeding be brought in the addressee's district.

ARGUMENT

1. Appellant's challenge to the venue provision in 19 U.S.C. 1305 is without merit. Congress enjoys "broad, comprehensive powers '[t]o regulate Commerce with foreign Nations.' Art. I, §8, cl. 3. Historically such broad powers have been necessary to prevent smuggling and to prevent prohibited articles from entry." *United States* v. *12 200-Ft. Reels of Film*, 413 U.S. 123, 125 (1973); see *United States* v. *Ramsey*, 431 U.S. 606, 619 (1977). In the exercise of this power, Congress has provided, in 19 U.S.C. 1305, for the seizure and forfeiture of obscene materials at the port of entry. The constitutional authority of Congress to authorize forfeiture actions for obscene materials imported into the country is clear. See *United States* v. *12 200-Ft. Reels of Film*, *supra; United States* v. *Thirty-Seven Photographs*, 402 U.S. 363 (1971). Thus, the only question presented here is whether the portion of Section 1305(a) that lays venue for such forfeiture actions in the district of seizure is unconstitutional.

The rule contended for by appellant—venue at the addressee's residence—would defeat the very congressional purpose in barring the materials from entry into the country. Moreover, it would interfere with the intent that forfeiture proceedings under Section 1305(a) be instituted with dispatch. The delay attendant upon

transferring the seized materials to the various districts to which they are addressed, in order that forfeiture proceedings may be instituted in those districts, would render it much more difficult to meet the short time deadlines contemplated by Section 1305(a).[2]

The venue provision in Section 1305 is consistent with the historical venue for *in rem* proceedings: the place where the property is found. See *Four Packages* v. *United States*, 97 U.S. 404 (1878); *Keene* v. *United States*, 9 U.S. (5 Cranch) 303, 310 (1809); *Clinton Foods, Inc.* v. *United States*, 188 F. 2d 289, 292 (4th Cir.), cert. denied, 342 U.S. 825 (1951); see also 28 U.S.C. 1395(b). A forfeiture proceeding is brought against the property, not against any possible claimant. Because the action is brought against the property, it is unnecessary, and it is often impossible, to determine who has the primary interest in the property prior to the institution of the forfeiture action. Accordingly, requiring that forfeiture actions under Section 1305(a) be brought in the districts where the addressees of the materials reside would not only be inconsistent with the traditional venue for *in rem* actions, it would also create great difficulties in the administration of the statute. Many of the obscene materials imported into the country are addressed to persons who did not solicit the materials and who have no interest in receiving them or in contesting the forfeiture action.

---

[2]In *United States* v. *Thrity-Seven Photographs, supra*, the Court construed Section 1305 to require that a forfeiture proceeding be instituted within 14 days of the seizure of the allegedly obscene goods and that the proceeding be completed within 60 days of its commencement. The legislative history cited by the Court in *Thirty-Seven Photographs* makes clear that Congress intended that the forfeiture proceedings were to be expedited in part by being brought in the district of seizure by "the nearest United States district attorney having authority under the law to proceed to confiscate" (402 U.S. at 371, quoting from 72 Cong. Rec. 5420 (1930) (remarks of Sen. Pittman)).

Moreover, obscene materials seized in a port of entry are often seized in large bulk packages containing many smaller items to be forwarded to a variety of addressees. A single forfeiture proceeding is brought against all the obscene materials as a lot, and notice is then sent to each of the addresses in case any should choose to challenge the forfeiture. To sort out the various individual packages for further shipment to inland districts, where the Customs Service does not have offices and where the addressees may have no interest in resisting forfeiture, would impose an unnecessary burden on the statutory procedure. See *United States* v. *Various Articles of Obscene Merchandise, supra*, 562 F. 2d at 188-189.

2. An analogous venue provision in another obscenity statute has been upheld by this Court. Section 1461 of Title 18 defines as nonmailable all obscene materials and makes it a criminal offense to use the mails for the delivery of any such materials. By virtue of 18 U.S.C. 3237, venue for the offense described in Section 1461 lies in any district "from, through, or into which such commerce or mail matter moves."

In *Reed Enterprises* v. *Clark*, 278 F. Supp. 372 (D.D.C. 1967), aff'd mem., 390 U.S. 457 (1968), a distributor challenged the venue provision as applied to Section 1461 on the ground that it imposed an unconstitutional burden on distributors of materials possibly subject to the Section. The venue provision, plaintiffs alleged, would enable the government to prosecute distributors not in the district from which the distribution was initiated, but in every district into which the materials were sent. 278 F. Supp. at 375. The three-judge court upheld the constitutionality of the venue provision, and this Court summarily affirmed that judgment. The district court noted that in considering questions of venue, this Court has

"never questioned the power of Congress to designate proscribed offenses as continuing offenses by regulation of the use of agencies of interstate commerce" (278 F. Supp. at 380). Accordingly, the court upheld the constitutionality of the venue provision even though it permitted the prosecution in a variety of distant districts of defendants who mail materials from their home districts.[3] See also *Hamling* v. *United States*, 418 U.S. 87, 106 (1974).[4]

3. This Court has noted that prosecutions—particularly in criminal cases—may impose serious hardships if they are brought in places distant from the defendant's residence. See *United States* v. *Johnson*, 323 U.S. 273 (1944). But this concern has consistently been regarded as an "objection to the policy of the law, not to the power of Congress to pass it." *Armour Packing Co.* v. *United States*, 209 U.S. 56, 77 (1908); *Hyde* v. *Shine*, 199 U.S. 62, 78 (1905); *Johnston* v. *United States*, 351 U.S. 215, 220-221 (1956); *Travis* v. *United States*, 364 U.S. 631 (1961); *Platt* v. *Minnesota Mining & Manufacturing Co.*, 376 U.S. 240, 245 (1964). Indeed, this Court has never held a federal venue statute unconstitutional, and in a case

---

[3]The court noted that its ruling was consistent with that of every other court that had addressed the issue. See *United States* v. *West Coast News Co.*, 357 F. 2d 855 (6th Cir. 1966), rev'd on other grounds sub nom. *Aday* v. *United States*, 388 U.S. 447 (1967); *United States* v. *Luros*, 243 F. Supp. 160, 167-168 (N.D. Iowa), cert. denied, 382 U.S. 956 (1965); *United States* v. *Frew*, 187 F. Supp. 500 (E.D. Mich. 1960); *Toscano* v. *Olesen*, 184 F. Supp. 296 (S.D. Cal. 1960).

[4]Department of Justice policy forbids unrestricted "forum shopping" in cases brought under Section 1461, as noted in our memorandum in *Blucher* v. *United States*, No. 78-571, a copy of which we have provided to appellant. Where the prosecution is brought in a district in which the defendant has solicited business or mailed materials in the regular course of his business, however, the prosecution in that district violates neither the Constitution nor Department of Justice policy.

such as this one, where the materials are forfeited in the same district in which they are seized, there is ample constitutional basis for laying venue in that district.

Even if the venue provision in Section 1305(a) might be deemed unduly burdensome in some other factual setting, it is not so with respect to appellant. As appellant admits, he spends summers of each year in New York; the rest of the year he lives in his winter residence in Puerto Rico. He is therefore not inconvenienced with respect to any forfeiture proceedings that may be brought against materials addressed to him during the portion of the year that he resides in New York. His complaint is that he suffers an inconvenience if a forfeiture is brought in New York during the period of the year when he is in Puerto Rico, and he elects to contest the forfeiture *pro se*. The district court noted that this sequence of events had occurred once before, and that appellant had contested the forfeiture, but without even raising the constitutional objection he now asserts (J.S. App. 3a).

Even assuming, as appellant contends, that this scenario is likely to recur, the burden on his ability to conduct a pro se defense to the forfeiture action is not significant. Because he returns to his permanent residence in New York each year for the summer, the only inconvenience imposed upon him when materials addressed to him are seized in New York is that he must seek a continuance of the forfeiture action until his return to New York. Whatever the burden on permanent residents of districts distant from particular ports of entry where obscene materials are seized, the inconvenience to appellant is minimal, and it provides no basis for upsetting the traditional venue provision for the *in rem* forfeiture proceeding authorized by Section 1305(a).

4. Appellant asserts (J.S. 21-23) that Section 1305(a) and certain Customs Service regulations deprive mail order customers of the equal protection of the laws by drawing an irrational distinction between travellers who carry obscene materials into the country and mail order patrons who seek to import such materials through the international mails. The venue provision of Section 1305(a) applies differently to these two classes of persons, appellant contends, because 19 C.F.R. 18.13 permits the baggage of international passengers who arrive in New York on their way to another port of entry to be shipped in bond and examined at the latter port of entry. If, upon examination there, the baggage is found to contain obscene materials, the materials are seized at that place and, under Section 1305(a), a forfeiture proceeding is instituted in the district of that port of entry.

The reason for the customs regulation is obvious: it is often inconvenient to international travelers or carriers to submit to full baggage inspection at the first port of entry reached in this country, and a subsequent inspection is equally practical if the traveler will pass through another port of entry on the way to his ultimate destination. The same is not true of international mail that is routinely inspected at a single port of entry, such as New York, and then forwarded to inland destinations. It would be exceedingly cumbersome to separate those materials destined to pass through another port of entry for subsequent reinspection in that port of entry. In any event, even if the mail would pass through another port of entry before its ultimate delivery, that port of entry would not necessarily be located in the addressee's home district. In sum, the regulation that accommodates international travelers could not readily be extended to apply in the very different setting of international mail. The distinction drawn between the procedures

applicable to international mail and international travel is thus a rational one and does not constitute a denial of equal protection to mail order customers such as appellant.

CONCLUSION

The judgment of the three-judge court should be affirmed.

Respectfully submitted.

WADE H. MCCREE, JR.
Solicitor General

APRIL 1979

DOJ-1979-04